No. 76

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE FEDERAL LAND BANK OF ST. PAUL, PETITIONER

v.

BISMARCK LUMBER COMPANY, AND JOHN GRAY, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors	3
Summary of argument	4
Argument:	
I. Section 26 of the Federal Farm Loan Act exempts petitioner from the North Dakota sales tax	9
A. The tax is laid on the petitioner	9
B. The terms and the history of section 26 require the exemption of the petitioner from the state sales tax	15
1. The role of the tax clause	15
2. Section 26 in terms exempts the petitioner	17
3. Section 26 as a whole exempts the petitioner	17
4. The legislative history of similar provisions indicates that an exemption from sales taxes was intended	20
5. The petitioner's functions are such that Congress must have intended an exemption	28
6. The administrative and judicial practice	33
II. Congress has power to exempt petitioner from state taxes	37
A. The lending functions of the federal land banks are "governmental"	38
B. Congress has power to determine the tax immunity or liability of federal instrumentalities	44
1. This Court has settled the question	44
2. The constitutional basis	47
Conclusion	53
Appendix A	54
Appendix B	68

407473—41——1

CITATIONS

Cases: Page

Alabama v. *King & Boozer*, No. —, this Term 16
Allen v. *Regents*, 304 U. S. 439 38
Ambrosini v. *United States*, 187 U. S. 1 38
Baltimore Nat. Bank v. *Tax Comm'n*, 297 U. S. 209 ..... 5, 22, 51
Bank of Commerce v. *New York City*, 2 Black 620 49
Bank Tax Case, 2 Wall. 200 49
The Banks v. *The Mayor*, 7 Wall. 16 49
Bank v. *Supervisors*, 7 Wall. 26 ..... 49, 51
Board of Trustees v. *United States*, 289 U. S. 48 40
British-American Co. v. *Board*, 299 U. S. 159 ..... 48, 51
Brush v. *Commissioner*, 300 U. S. 352 38
California v. *Pacific Railroad Co.*, 127 U. S. 1 50
Central Pacific Railroad v. *California*, 162 U. S. 91 51
Choate v. *Trapp*, 224 U. S. 665 51
City of Clifton v. *State Board of Tax Appeals*, 17 Atl. (2d) 476 ..... 34, 43
City of New York v. *Feiring*, No. 863, October Term, 1940 14
Clallam County v. *United States*, 263 U. S. 341 ..... 16, 32, 41, 52
Collector, The v. *Day*, 11 Wall. 113 ..... 8, 49
Colorado Bank v. *Bedford*, 310 U. S. 41 ..... 4, 13, 14
Craig v. *Federal Land Bank of New Orleans*, 189 Miss. 309 ..... 34, 43, 77
Des Moines Bank v. *Fairweather*, 263 U. S. 103 50
Dobbins v. *Erie County*, 16 Pet. 435 49
Farmers Bank v. *Minnesota*, 232 U. S. 516 50
Federal Compress Co. v. *McLean*, 291 U. S. 17 51
Federal Land Bank v. *Crosland*, 261 U. S. 374 ..... 7, 45, 51
Federal Land Bank v. *De Rochford*, 69 N. D. 382 ..... 35, 37, 43, 74
Federal Land Bank v. *Gaines*, 290 U. S. 247 ..... 28, 30
Federal Land Bank v. *Priddy*, 295 U. S. 229 ..... 28, 29, 30, 44
Federal Land Bank of Columbia v. *State Highway Department*, 172 S. C. 174 ..... 34, 43, 72
Federal Land Bank of New Orleans v. *Tatum*, 174 Miss. 264 43
Federal Reserve Bank v. *Register of Deeds*, 288 Mich. 120 ..... 34, 43, 77
Fidelity & Deposit Co. v. *Pennsylvania*, 240 U. S. 319 51
Flint v. *Stone Tracy Co.*, 220 U. S. 107 38
Fox Film Corp. v. *Doyal*, 286 U. S. 123 51
Geery v. *Minnesota Tax Commission*, 204 Minn. 107, petition dismissed, 307 U. S. 648, judgment vacated, 204 Minn. 622 43
Gillespie v. *Oklahoma*, 257 U. S. 501 48
Goudy v. *Meath*, 203 U. S. 146 51
Graves v. *New York ex rel. O'Keefe*, No. 478, October Term, 1938 ..... 38, 44, 49
Graves v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466 ..... 7, 18, 42, 48, 50
Green v. *Frazier*, 253 U. S. 233 41

Cases—Continued. Page

Haggar Co. v. *Helvering*, 308 U. S. 389 25
Heiner v. *Mellon*, 304 U. S. 271 13
Helvering v. *Davis*, 301 U. S. 619 30
Helvering v. *Gerhardt*, 304 U. S. 405 ..... 8, 38, 41, 48, 50
Helvering v. *Morgan's Inc.*, 293 U. S. 121 18
Helvering v. *N. Y. Trust Co.*, 292 U. S. 455 25
Helvering v. *Powers*, 293 U. S. 214 ..... 38, 49
Helvering v. *Therrell*, 303 U. S. 218 ..... 38, 42
Helvering v. *Twin Bell Syndicate*, 293 U. S. 312 25
Home Owners' Loan Corporation v. *McGoldrick*, 10 U. S. L. W. 2063 ..... 35, 43, 78
Howard v. *Gipsy Oil Co.*, 247 U. S. 503 48
Indian Motorcycle Co., v. *United States*, 283 U. S. 570 11
Interstate Commerce Commission v. *Brimson*, 154 U. S. 447 47
James v. *Dravo Contracting Co.*, 302 U. S. 134 51
Jaybird Mining Co. v. *Weir*, 271 U. S. 609 50
Jewel Tea Co. v. *State Tax Commission*, 293 N. W. 386 ..... 4, 12
Jones v. *City of Portland*, 245 U. S. 217 41
Knox Loan Assn. v. *Phillips*, 300 U. S. 194 ..... 28, 32
Large Oil Co. v. *Howard*, 248 U. S. 549 48
Lawrence v. *Shaw*, 300 U. S. 245 51
Logan v. *United States*, 144 U. S. 263 47
Long v. *Rockwood*, 277 U. S. 142 50
Loomis v. *First Federal Savings and Loan Association*, No. 277, October Term, 1938 (dismissed on motion for petitioners, *sub. nom. Martin* v. *First Federal Savings and Loan Assn.*, 305 U. S. 666) 40
Lyeth v. *Hoey*, 305 U. S. 188 13
McCulloch v. *Maryland*, 4 Wheat., 316 ..... 7, 8, 16, 42, 45, 47, 48, 49
McGoldrick v. *Berwind-White Co.*, 309 U. S. 33 13
Mercantile Bank v. *New York*, 121 U. S. 138 51
Mid-Northern Co. v. *Montana*, 268 U. S. 45 51
Miller v. *Milwaukee*, 272 U. S. 713 51
Missouri v. *Gehner*, 281 U. S. 313 50
Morgan v. *Commissioner*, 309 U. S. 78 13
Murray v. *Wilson Distilling Co.*, 213 U. S. 151 38
New Brunswick v. *United States*, 276 U. S. 547 16
New York ex rel. Rogers v. *Graves*, 299 U. S. 401 ..... 38, 41
Ohio v. *Helvering*, 292 U. S. 360 38
Oklahoma v. *Barnsdall Corp.*, 296 U. S. 521 ..... 48, 51
Osborn v. *United States Bank*, 9 Wheat. 738 ..... 16, 49
Owensboro National Bank v. *Owensboro*, 173 U. S. 664 51
Panhandle Oil Co. v. *Knox*, 277 U. S. 218 50
People v. *Weaver*, 100 U. S. 539 51
Phelps-Dodge Corp. v. *Labor Board*, No. 387, October Term, 1940 18
Pittman v. *Home Owners' Loan Corporation*, No. 10, October Term, 1939, pp. 44-49 ..... 16, 44, 48

Cases—Continued. Page

Pittman v. *Home Owners' Corp.*, 308 U. S. 21 . 7, 8, 42, 44, 45, 47, 51
Reconstruction Finance Corporation v. *Menihan Corp.*, 312 U. S. 81 42
Roberts v. *Federal Land Bank of New Orleans*, 189 Miss. 898 . . . . . 34, 43, 77
Shaw v. *Oil Corp'n*, 276 U. S. 575 51
Smith v. *Kansas City Title Co.*, 255 U. S. 180 . 7, 28, 30, 43, 45, 51
Snyder v. *Bettman*, 190 U. S. 249 38
South Carolina v. *United States*, 199 U. S. 437 . . . . . 38, 41, 50
Stahmann v. *Vidal*, 305 U. S. 61 14
Thomson v. *Pacific Railroad*, 9 Wall. 579 51
Trotter v. *Tennessee*, 290 U. S. 354 51
United States v. *Butler*, 297 U. S. 1 30
United States v. *California*, 297 U. S. 175 40
United States v. *The Cooper Corporation*, 312 U. S. 600 . . . 25
United States v. *Pelzer*, 312 U. S. 399 13
United States v. *Railroad Company*, 17 Wall. 322 . . . . . 16, 38
Van Allen v. *The Assessors*, 3 Wall. 573 51
Van Brocklin v. *Tennessee*, 117 U. S. 151 . . . . . 16, 42
M. G. West Co. v. *Johnson*, 20 Cal. App. (2d) 95, certiorari denied, 302 U. S. 638 . . . . . 35, 43, 75
Western Lithograph Co. v. *State Board of Equalization*, 11 Cal. (2d) 156 . . . . . 35, 75
Weston v. *City Council of Charleston*, 2 Pet. 449 49

Statutes:

Act creating Federal Reserve Banks, 38 Stat. 251, sec. 7 . . 21, 33
Federal Farm Loan Act of July 17, 1916, 39 Stat. 360
Sec. 3 29
4 29
7 29
8 29
12 . . . . . 29, 30
13 29
14 29
26 (U. S. C., Title 12, Sec. 931) 5, 17, 22, 44, 54
412 21
Act creating Federal Intermediate Credit Banks, 42 Stat. 1454, sec. 210 21
Act creating Reconstruction Finance Corporation, 47 Stat. 5, sec. 10 . . . . . 5, 21, 22
Act creating Federal Home Loan Banks, 47 Stat. 725, sec. 13 21
Act creating Home Owners' Loan Corporation, 48 Stat. 128, sec. 4 (c) 21
Act creating Federal Deposit Insurance Corporation, 48 Stat. 162, sec. 8 [12B (p)], as amended by sec. 101 of the Banking Act of 1935, 49 Stat. 684 21

Statutes—Continued. Page

Act creating Central Bank for Cooperatives, Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, 48 Stat. 257, sec. 63 (12 U. S. C. 1138c) 19, 21, 26
Act creating Federal Farm Mortgage Corporation, 48 Stat. 344, sec. 12 21
Act creating Federal Savings and Loan Insurance Corporation, 48 Stat. 1246, sec. 402 (e) 21
Act of March 20, 1936, 49 Stat. 1185 (U. S. C. Supp. V, Title 12, sec. 51d) 22
Act of June 16, 1936, 49 Stat. 1519, sec. 10 27
Act creating Farmers' Home Corporation, 50 Stat. 522, sec. 40 (i) 21
Act creating United States Housing Authority, 50 Stat. 888, sec. 5 (e) 21
Act creating Federal Crop Insurance Corporation, 52 Stat. 31, sec. 511 21
Pub. No. 7, 77th Cong., 1st sess. approved Feb. 19, 1941, sec. 4 (a) 25
Pub. No. 108, 77th Cong. 1st sess. sec. 3 (b). (June 10, 1941) 23
Pub. No. 819, 76th Cong., 3d sess.:
Sec. 3 (a) 26, 27
6 (b) 26, 27
North Dakota Laws of 1937, c. 249.
Sec. 1 ..... 11, 55
2 ..... 9, 13, 14, 57
3 58
4 11
5 59
6 ..... 10, 14, 59
7 ..... 10, 14, 59, 60
8 ..... 10, 60
9 ..... 10, 60
10 ..... 10, 60, 61
11 63
12 ..... 14, 64
13 ..... 10, 65
15 ..... 10, 11, 65
21 67
22 10
23 67
North Dakota Laws of 1939, c. 234, sec. 1 ..... 9, 57
North Dakota Laws of 1939, c. 241 55
S. B. No. 40, approved March 14, 1941 ..... 9, 57

Page

Miscellaneous:
87 Cong. Rec.:
4255–4256 25
4616 24
4628–4629 24
VIII—1 Cum. Bul. 69 20
XIII—2 Cum. Bul. 47 20
Farm Credit Administration, Eighth Annual Report (1940) 29, 30, 32
Farrand, Records of the Federal Convention:
I, 164 47
II, 27 47
H. Rpt. No. 69, 63d Cong., 1st sess., p. 39 21
H. Rpt. No. 279, 73d Cong., 1st sess., p. 4 21
H. Rpt. No. 1922, 73d Cong., 2d sess., p. 4 22
H. Rpt. No. 1995, 74th Cong., 2d sess., pp. 1–2 22
H. Rpt. No. 2199, 74th Cong., 2d sess 23
H. Rpt. No. 1267, 76th Cong., 1st sess., pp. 2–3 27
H. Rpt. No. 20, 77th Cong., 1st sess., p. 3 26
H. Rpt. No. 514, 77th Cong., 1st sess., p. 2 24
S. Doc. No. 172, 76th Cong., 3d sess., p. 196 33
S. Rpt. No. 144, 64th Cong., 1st sess., pp. 7, 9, 10 30
S. Rpt. No. 1545, 74th Cong., 2d sess 23
S. Rpt. No. 1028, 76th Cong., 1st sess., pp. 1–2 27
S. Rpt. No. 1625, 76th Cong., 3d sess., pp. 3–4 27
S. Rpt. No. 41, 77th Cong., 1st sess., pp. 3–4 26
S. Rpt. No. 292, 77th Cong., 1st sess., p. 2 24
Story, Constitution, I, sec. 1053 49

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 76

THE FEDERAL LAND BANK OF ST. PAUL, PETITIONER

v.

BISMARCK LUMBER COMPANY, AND JOHN GRAY, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BRIEF FOR THE PETITIONER

OPINION BELOW

The District Court of Burleigh County wrote no opinion. The opinion of the Supreme Court of North Dakota (R. 22) is reported in 297 N. W. 42.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on March 17, 1941 (R. 20). The petition for a writ of certiorari was filed on May 9, 1941, and was granted on May 26, 1941 (R. 47). The jurisdiction of this Court rests on

Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is subject to the Sales Tax Act of North Dakota.

STATUTES INVOLVED

The relevant provisions of the Federal Farm Loan Act (39 Stat. 360; 12 U. S. C. secs. 641 *et seq.*) and of the Sales Tax Act of North Dakota (Laws 1937, c. 249) are reprinted in Appendix A, *infra*, pp. 54–67.

STATEMENT

The petitioner, created under the Federal Farm Loan Act of July 17, 1916, acquired three farm properties in Burleigh County, North Dakota, in the course of its farm mortgage lending business (R. 3). It was necessary for petitioner to purchase materials in order to repair and improve the buildings and fences located on these properties (R. 3). For this purpose it purchased lumber and other building materials, of an aggregate value of $408.26 from the Bismarck Lumber Company. The Lumber Company demanded a total of $8.02 from the petitioner, representing the amount of the state sales tax, which the petitioner refused to pay (R. 4–6).

The petitioner on March 9, 1938, filed a complaint in the District Court of Burleigh County against

the Lumber Company and the Tax Commissioner of the State of North Dakota[1] (R. 2–10). It alleged the foregoing facts and prayed that the court adjudge that the petitioner is not liable for the sales tax (R. 9), because it is exempt under section 26 of the Federal Farm Loan Act and the federal Constitution (R. 8–9). The respondents demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action (R. 11).

The court on May 6, 1938, sustained the demurrer (R. 12) and entered judgment against the petitioner in the amount of $8.02 (R. 12–13). The Supreme Court of North Dakota on appeal heard argument on June 14, 1938, and reargument on July 26, 1939 (R. 19–20). On March 17, 1941, it affirmed the judgment of the District Court (R. 20), with one judge dissenting (R. 39–46).

SPECIFICATION OF ERRORS

The Supreme Court of North Dakota erred:

1. In holding that the lending functions of petitioner were proprietary or non-essential functions.

2. In holding that the lending functions of petitioner were additional and unrelated to its governmental functions.

---

[1] Owen T. Owen was named as the original defendant. He resigned the office of Tax Commissioner on December 26, 1938. His successor, John Gray, who took office on May 18, 1939, was substituted by order of this Court on May 26, 1941.

3. In holding that Congress had no constitutional power to provide that petitioner's lending functions should be exempt from state taxation.

4. In holding that the North Dakota sales tax was applicable to petitioner notwithstanding the exemption provided in section 26 of the Federal Farm Loan Act, and notwithstanding the implications of the federal Constitution.

5. In holding, in the alternative, that section 26 of that Act did not exempt petitioner from the state sales tax.

6. In holding the North Dakota sales tax applicable to the purchases made by petitioner.

7. In affirming the judgment of the District Court of Burleigh County, North Dakota.

SUMMARY OF ARGUMENT

I

A. The North Dakota sales tax is collected from the seller but is imposed upon the purchaser. Section 6 requires that the retailers add the sales tax to their price, and section 7 makes it unlawful for the seller to hold out that he has absorbed any part of the tax burden. The Supreme Court of North Dakota has twice ruled that the sales tax is laid upon the purchaser. *Jewel Tea Co.* v. *State Tax Commission,* 293 N. W. 386; R. 23. When the state decision follows the provisions of the act, as here, it is controlling. *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52.

B. Since the North Dakota sales tax is imposed upon the purchaser, the petitioner is exempt from the tax in making its purchases. (1) This would be the case even had Congress been silent; but instead it affirmatively provided immunity. (2) Section 26 of the Federal Farm Loan Act provides exemption for "every Federal land bank", and thus recites all taxes imposed upon the banks themselves. (3) The text is confirmed by the structure. The broad exemption of "every Federal land bank" is not narrowed by the specific illustrations of capital, reserve, and income, for these are enumerated simply as included within the general exemption. If the exemption were not one of general application, there would have been no occasion in section 26 to except from the tax exemption real estate held by the banks.

(4) The legislative history of similar tax exemption clauses offers support to our construction. The history of section 10 of the Reconstruction Finance Corporation Act, in particular, affords a quite clear indication of the congressional intention. Congress moved promptly to avoid the effect of this court's decision (*Baltimore Nat. Bank* v. *Tax Comm'n,* 297 U. S. 209) that the Reconstruction Finance Corporation was taxable on its national bank shares; the committee reports explain that section 10 "was intended to give as wide immunity as possible to the functions and activities of the corporation." Section 10 of the Reconstruction Finance Corporation Act was again amended

on June 10, 1941, to insure that the tax exemption applied not only to the Reconstruction Finance Corporation but also to its subsidiary or controlled corporations; the Act provided that the tax exemption "(which shall, for all purposes, be deemed to include sales * * * taxes) shall be construed to be applicable" to the subsidiary corporations. The committee reports make it plain that Congress by this declaration sought only to confirm its original understanding of the exemption.

(5) If the construction of section 26 were otherwise doubtful, it might be argued that the court should attempt to decide whether the immunity from sales taxes is wise, and thus attempt to arrive at the probable legislative intention. Apart from the inevitable hazards of such an approach to statutory construction, one must conclude that the Congress of 1916 would more probably than not have intended an exemption from sales taxes. The federal land bank system was designed to advance credit to farm borrowers at the lowest possible rate. To hold this rate down to the minimum, Congress was willing to sacrifice state tax revenues. This prescription of immunity does not result in private benefit; at this time the Government owns a substantial part of the federal land bank stock, and the remainder is held by borrowers. Any reduction in expense thus serves automatically to reduce the interest rate upon borrowing.

(6) The various feredal agencies operating under similar tax exemption clauses have uni-

formly construed these as exempting the agency from sales taxes imposed upon the purchaser. The state courts and tax officials, however, have not been equally consistent in their treatment of the question.

II

A. It is wholly clear, both on principle and on authority, that the lending functions of the federal land banks are "governmental" in nature. Whatever the philosophic adequacy of the "proprietary function" limitation upon tax immunity, it has never been applied to the functions of the federal government. That government can exercise only powers which are delegated to it by the Constitution. If constitutional, the exercise of power must by definition be governmental. Any other rule would result in a catastrophic practical impairment of the federal functions. Accordingly, the Court in its earliest as in its latest decisions in tax immunity litigation has emphasized that every federal activity under the delegated powers is governmental in nature. *McCulloch* v. *Maryland*, 4 Wheat. 316, 432; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32.

B. (1) Several decisions of this court have squarely held that Congress has constitutional power to prescribe tax immunity for the lending functions of federal credit agencies. *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Federal Land*

Bank v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21. These decisions are conclusive. They did not deal with sales taxes but, so long as those taxes are equally included within the reach of section 26, there is no room for speculation as to whether the immunity from one type of taxes as contrasted with another is wise. *Pittman* v. *Home Owners' Corp.*, *supra*, 33.

(2) These decisions rest upon elementary principles of constitutional theory. Article VI, establishing the acts of Congress as the supreme law of the land, was enacted in consequence of a basic postulate of a federated system, that the national government is composed of representatives of the state governments, while it has no representation in the local legislatures. This Court has specifically noted that Congress may be expected to legislate in recognition of the states' need for tax revenues, while the converse is not necessarily true. *McCulloch* v. *Maryland*, *supra*, 435–436; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412–413, 416–417. For the first half century of tax immunity litigation, the decisions turned exclusively upon the supremacy clause of Article VI. Even after *The Collector* v. *Day*, 11 Wall. 113, the Court has frequently recurred to this specific basis of tax immunity. Many cases have recognized the power of Congress to waive an immunity which otherwise would attach to federal instrumentalities; other cases have held the taxpayer liable simply because Congress

had failed to provide immunity; and the Court in a number of other cases has extended immunity from state taxes only, or in part, because Congress had so provided. Necessarily, then, the tax immunity of the United States and its instrumentalities is in the ordinary case a question simply of congressional intent. That question is set at rest by section 26 of the Federal Farm Loan Act.

ARGUMENT

I

SECTION 26 OF THE FEDERAL FARM LOAN ACT EXEMPTS PETITIONER FROM THE NORTH DAKOTA SALES TAX

A. THE TAX IS LAID ON THE PETITIONER

The petitioner purchased lumber and other building materials from the respondent Lumber Company, which demanded $8.02 from the petitioner in payment of the North Dakota sales tax. This tax is imposed by c. 249 of N. D. Laws of 1937, *infra*.[1] The terms of the act and the decisions of the Supreme Court of North Dakota alike show that the purchaser is the one upon whom the sales tax is imposed.

Section 2 imposes a tax of two percent "upon the gross receipts from all sales of tangible personal

---

[1] As originally enacted, Section 2 limited the life of the tax until June 30, 1939. By successive amendments, however, the period has been extended until June 30, 1943. Laws of 1939, c. 234, Sec. 1; S. B. No. 40, approved March 14, 1941.

property * * * sold at retail in the State of North Dakota to consumers or users." The retailer is without doubt the immediate taxpayer and the one to whom the state looks for its collection.[2] But his function, under the statute, is not that of a taxpayer who may meet his obligation as he chooses. The retailer must collect the tax from his customers and then pay it over to the state.

This duty does not arise from economic forces. It is compelled by law. Section 6 of the Act provides:

> Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

Its effect is reinforced by section 7, which provides:

> It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this

---

[2] The retailer must keep records of his sales. Sec. 8. He shall file quarterly tax returns. Sec. 9. He shall pay the tax indicated by the return. Sec. 10. A lien for unpaid taxes is imposed upon his property. Sec. 10 (4). He is liable for penalties for failure to file a return or pay the tax. Sec. 15. Refunds of overpayments are to be made to the retailer. Secs. 13, 22.

> Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

These sections, then, require that the retailer add the amount of the tax to his selling price and make it unlawful [3] for him to state that any part of the tax has been absorbed by him.

The North Dakota legislature insured that the retailer need not meet the tax burden intended for the consumer through two further provisions. Section 4 provides for the credit of taxes paid on sales represented by accounts found to be worthless and charged off, while section 1 (f) excludes, from the measure of the tax, discounts, refunds made upon the return of the goods sold, and future instalments under conditional sales contracts.

The retailer must pay the tax to the State but, correlatively, he must collect it from the purchaser. The legislature, accordingly, contemplated that the tax would be laid upon the purchaser, and that the retailer was simply a collector who would remit the tax to the State. It is unnecessary in this case to explore the economic incidence of a sales tax, or to speculate as to where the burden will fall. Cf. Mr. Justice Stone, dissenting in *Indian*

---

[3] Section 15 (2) provides a penalty of $1,000 or imprisonment for one year, or both, for violation of Section 7.

Motocycle Co. v. *United States,* 283 U. S. 570, 581. For the North Dakota legislature has by law insured that the duty of paying the tax will be placed upon the purchaser, and that the amount of the tax will be collected as such from the purchaser.

The Supreme Court of North Dakota has so ruled. In *Jewel Tea Co.* v. *State Tax Commission,* 293 N. W. 386 (July 30, 1940), the court held the sales tax applicable to goods shipped in interstate commerce and thereafter sold within the state by the Tea Company. The decision was placed squarely on the ground that the tax was imposed upon the purchaser and not upon the seller.[4] It said (293 N. W. at 389) that "what the plaintiff is required to do is to collect the tax and remit." Under sections 6 and 7, "it is the consumer who pays the tax," and "this tax is laid primarily upon the consumer." The seller, the court continues, is not "burdened by imposition of the tax on the consumer," and the tax machinery is directed at the seller only because "in order to insure collection of this tax, resort is had to the records of the retailer." The ruling of the *Jewel Tea* case has not been qualified and, indeed, has been reaffirmed in the case at bar. The opinion below states in terms that the sales tax "is required to be paid by the buyer" (R. 23). These

[4] We do not suggest that the commerce clause would invalidate a sales tax imposed upon the seller under the circumstances of the *Jewel Tea* case. But the excessive caution of the premise from which the North Dakota court approached the commerce clause question does not weaken the force of its decision as to the effect of the North Dakota sales tax.

decisions of the North Dakota court are entitled to great weight in the analysis of the North Dakota sales tax statute in order to determine who is the real taxpayer. *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52.[5]

This Court in several cases has made the same ruling with respect to substantially similar taxes. In *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 43, it held, as to the New York City sales tax, that "the ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, * * * and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him." The New York City Tax contains sanctions against the purchaser which are lacking in the North Dakota tax,[6]

---

[5] Whether section 26 of the Federal Farm Loan Act immunizes petitioner from the North Dakota sales tax is, of course, a federal question. If, as we suggest at this point, this federal issue turns upon the legal incidence of the tax, this Court is not controlled by the characterizations or conclusions of the state court. See *Heiner* v. *Mellon,* 304 U. S. 271, 279; *Lyeth* v. *Hoey,* 305 U. S. 188, 193-194; *Morgan* v. *Commissioner,* 309 U. S. 78, 81; *United States* v. *Pelzer,* 312 U. S. 399. But the decisions of the state court are entitled to much weight in the inquiry as to how the state statute actually operates, and upon whom the tax burden was intended to be placed by the state legislature.

[6] Section 2 provides that the tax "shall be paid by the purchaser to the vendor, for and on account of the City of of New York," and requires the buyer to pay the tax to the City if it has not been collected by the seller. 309 U. S. at 43.

but these are immaterial, as shown by *Colorado Bank* v. *Bedford*, 310 U. S. 41. There the Colorado tax on services, including safety-vault services, set up relationships between the seller, the buyer, and the tax collector which are not markedly different from those under the North Dakota sales tax.[7] The Court assumed that taxation of the national bank would be forbidden, but held that "the tax is upon the user of the safe-deposit boxes, not upon the bank" (310 U. S. at 51). The Court, in reaching this conclusion, noted that the real taxpayer "is the person ultimately liable for the tax itself" (Cf. *Stahmann* v. *Vidal*, 305 U. S. 61) and that "the funds which were received by the State came from the assets of the user, not from those of" the bank (310 U. S. at 52).[8]

---

[7] The person rendering the services is liable for payment of the tax. He is required as far as practicable to add the tax to the value of the services, showing it as a separate item, and the tax shall be a debt to him from the user; the seller is forbidden to hold out that he has absorbed the amount of the tax. Sec. 6. Credit is given the seller for taxes paid on accounts which become worthless. Sec. 2 (h). The user, however, may recover illegally collected taxes. Sec. 7. Amounts paid by the user as taxes are public funds of the State. Sec. 12. 310 U. S. at 44, 45. The last two provisions are not found in the North Dakota tax, but section 7 was not relied upon at all by this Court and section 12 was not given controlling weight. See 310 U. S. at 51, 52.

[8] These decisions are not qualified by *City of New York* v. *Feiring*, No. 863, October Term, 1940. That case held that the seller's obligation to pay over the New York City sales taxes collected by him was a "tax" and so entitled to priority under Section 64 of the Bankruptcy Act.

The terms of the North Dakota sales tax act, the decisions of the Supreme Court of North Dakota, and the analogic decisions of this Court alike require the conclusion that the sales tax is imposed upon the buyer and not upon the seller, who acts simply as collecting agent for the State. It follows that the real taxpayer in this case is the petitioner and not the respondent Lumber Company.

B. THE TERMS AND THE HISTORY OF SECTION 26 REQUIRE THE EXEMPTION OF THE PETITIONER FROM THE STATE SALES TAX

The Supreme Court of North Dakota, although recognizing that the sales tax was laid upon the petitioner, ruled as an alternative ground of its decision that section 26 of the Federal Farm Loan Act did not exempt the petitioner (R. 37–39). Its decision seems to have been placed upon the ground that section 26 contained a few specific exemptions and accordingly authorized the imposition of all other taxes. The decision both mistakes the function of the tax clause and misreads the provisions of section 26.

1. *The Role of the Tax Clause.* The federal land bank system, as we show below (pp. 28–33), is to be considered a part of the federal government. When the North Dakota sales tax is applied to petitioner's transactions, it is imposed on petitioner, and thus on the Government itself.

One proposition in the field of tax immunity litigation is wholly clear; it is that, in the absence of congressional consent, the states may not tax the federal government itself.[9] *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151; *Clallam County* v. *United States*, 263 U. S. 341; *New Brunswick* v. *United States*, 276 U. S. 547; see *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738; *United States* v. *Railroad Company*, 17 Wall. 322. Accordingly, if Congress were entirely silent, as the court below at one point suggests (R. 38), petitioner would yet be exempt from taxes imposed on it and would share the immunity of the United States. That immunity, as we argue in *Alabama* v. *King & Boozer*, No. —, this Term, excludes sales taxes which are by law laid upon the United States.

If, therefore, petitioner were to be held liable for the North Dakota sales tax, it would be necessary to find at last an implied waiver by Congress of petitioner's immunity. It is unnecessary to elaborate this proposition, for not only is there no waiver but, on the contrary, Congress has affirmatively provided that petitioner shall be exempt from state taxation.

---

[9] The argument is developed in more detail in the Government's brief in *Pittman* v. *Home Owners Loan Corporation*, No. 10, October Term, 1939, pp. 44–49.

2. *Section 26 in Terms Exempts the Petitioner.* Section 26 of the Federal Farm Loan Act, *infra*, provides in part:

> That every Federal land bank * * *, shall be exempt from Federal, State, municipal, and local taxation.

The section exempts from state taxation "every Federal land bank." As we have shown, the North Dakota sales tax is laid upon the buyer. It follows that petitioner, in purchasing materials in North Dakota, is exempt under the Federal Farm Loan Act from the state sales tax.

3. *Section 26 as a Whole Exempts the Petitioner.* The conclusion that sales taxes laid upon the purchaser are included within the express exemption from taxes imposed upon a federal land bank is confirmed by consideration of section 26 as a whole. It provides:

> That every Federal land bank * * *, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held * * * by said bank * * *. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds * * * and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

> Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner * * * subject to the conditions and limitations contained in Section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

The tax exemption created by section 26 is a broad immunity from every tax imposed upon a federal land bank, and is not limited to the specific illustrations given in the section. Textually, the section exempts from taxation the land banks, and the enumeration of capital, surplus and income are merely stated to be included within that broad exemption.[10] The term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle. *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 125; *Phelps-Dodge Corp.* v. *Labor Board*, No. 387, October Term, 1940.

The wording of the section is confirmed by the structure. If the broad exemption of "every Federal land bank" were confined to the subsequent specific illustrations, there would be no occasion to

---

[10] In *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 479, the opinion describes the similarly worded exemption of the H. O. L. C. as follows: "The corporation *itself*, 'including its franchise * * *,' is likewise exempted from taxation" [Italics added].

except from the tax exemption real estate held by the banks.[11]

The contrary view of the court below has startling implications. The cash and bank accounts held by the federal land banks, their office fixtures, their security transactions, are all accepted as exempt from taxation. The exemption, if it be found in section 26, must rest on the exemption of the federal land bank itself. Certainly, it is doubtful that Congress would choose to exempt from taxation the capital, surplus, and income of federal land banks and yet leave them subject to all other forms of taxation.

It is true that subsequent clauses specifically provide immunity for the bonds and mortgages of federal and joint-stock land banks. But the bonds would be held by private persons, and the mortgages held by joint-stock land banks would not be within the general exemption of federal land banks. Mortgages actually held by the federal land banks would be covered by the general exemption from taxation, but the specific exemption is of mortgages *executed* to the land banks. Their value as security and their attractiveness on sale would be im-

[11] Similarly, when Congress intended that the tangible personal property of the Production Credit organizations and the Banks for Cooperatives should be subject to taxation, the exception of real estate in a similar exemption section was expanded to include tangible personal property. Sec. 63, 48 Stat. 257, 267; 12 U. S. C. 1138c.

paired if the tax exemption vanished upon transfer by the land banks. See VIII–I Cum. Bull. 69; XIII–2 Cum. Bull. 47. Accordingly, the subsequent clauses of section 26 are not even tautologous, much less indicative of a legislative intent to qualify the broad and unequivocal exemption of "every Federal land bank."

The Supreme Court of North Dakota, however, suggests (R. 38) an alternative approach. The building materials purchased from respondent Lumber Company are to be used on petitioner's real estate; the inference seems to be that the sales tax is permitted as a tax "upon real estate held * * * by said bank." But, whatever the final use of the building materials, the tax on their sale is quite obviously not a tax on real estate.

Since, therefore, the North Dakota sales tax is laid upon the buyer, the petitioner in its purchases is exempt by section 26. This conclusion is required both by the text of the section and by the fact that it carves a narrow exception, real estate taxes, out of a broad and inclusive exemption from taxes imposed upon the federal land banks.

4. *The Legislative History of Similar Provisions Indicates that an Exemption from Sales Taxes was Intended.* The tax exemption clause of the Federal Farm Loan Act does not differ substantially from

that found in a number of other statutes.[12] Such light as the committee reports on these statutes throw indicates that the tax exemption clause was intended to exempt the federal instrumentality from sales taxes. The Committee reporting the Federal Reserve Act, in which the standard clause first appeared, stated (H. Rpt. No. 69, 63d Cong., 1st Sess., p. 39) that the federal reserve banks were exempted "from *all classes* of taxation, save such taxation as may be imposed upon the real estate held by these banks." [Italics added.] The House report on the bill creating the Federal Farm Mortgage Corporation similarly declares (H. Rpt. No. 279, 73d Cong., 2d Sess., p. 4) that "the Corporation shall be exempt from taxes except real-property taxes." The report on the bill creating the Federal Savings and Loan Insurance Corpora-

[12] The acts creating: Federal Reserve Banks, sec. 7, 38 Stat. 251, 258; Federal Intermediate Credit Banks, sec. 210, 42 Stat. 1454, 1459; Reconstruction Finance Corporation, sec. 10, 47 Stat. 5, 9; Federal Home Loan Banks, sec. 13, 47 Stat. 725, 735; Home Owners' Loan Corporation, sec. 4 (c), 48 Stat. 128, 129; Federal Deposit Insurance Corporation, sec. 8 [12B (p)], 48 Stat. 162, 177, as amended by sec. 101 of the Banking Act of 1935, 49 Stat. 684, 709; Federal Farm Mortgage Corporation, sec. 12, 48 Stat. 344, 347; Central Bank for Cooperatives, Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, sec. 63, 48 Stat. 257, 267; Federal Savings and Loan Insurance Corporation, sec. 402 (e), 48 Stat. 1246, 1257; Farmers' Home Corporation, sec. 40 (i), 50 Stat. 522, 528; United States Housing Authority, sec. 5 (e), 50 Stat. 888, 890; Federal Crop Insurance Corporation, sec. 511, 52 Stat. 31, 72, 75.

tion is similarly worded. H. Rpt. No. 1922, 73d Cong., 2d Sess., p. 4.

The implications of this fragmentary legislative history receive specific confirmation from the subsequent legislative history of section 10 of the Reconstruction Finance Corporation Act, 47 Stat. 9. That section [13] is substantially identical with section 26 of the Federal Farm Loan Act. In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, this Court held the R. F. C. liable to state taxation on its national bank shares because section 5219 of the Revised Statutes provided that *all* shares of national banks could be taxed. Six weeks later, by the Act of March 20, 1936 (49 Stat. 1185; 12 U. S. C. Supp. V, sec. 51d), Congress amended, not the Reconstruction Finance Corporation Act, but the Acts relating to national banks, to exempt the R. F. C. from all such taxation, whether past or future. The Committee reports are completely explicit as to the Congressional understanding of the scope of the exemption intended by provisions such as that now under question. The House Committee on Banking and Currency said (H. Rpt. No. 1995, 74th Cong., 2d Sess., pp. 1–2):

> Section 10 has generally been understood to assert the broadest possible immunity from

---

[13] It provides in part: "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation * * *; except that any real property of the corporation shall be subject to State * * * or local taxation to the same extent according to its value as other real property is taxed."

> the burden of taxation for the Corporation, its assets and its operations. This construction follows from the language of the section which confers tax exemption upon "the Corporation", while specifically consenting to the taxation of real property alone. This construction follows also from the material impairment of the Corporation's operation and effectiveness by any burden of State and Federal taxation, for in furtherance of its purposes the corporation has kept its charges at the lowest rates consistent with sound financing.
>
> * * * * *
>
> The committee feels that when Congress enacted section 10 of the Reconstruction Finance Corporation Act, it was intended to give as wide immunity as possible to the functions and activities of the Corporation, and the enactment of the proposed bill will accomplish that intention.

To the same effect, see H. Rpt. No. 2199, 74th Cong., 2d Sess.; S. Rpt. No. 1545, 74th Cong., 2d Sess.

Section 10 of the Reconstruction Finance Corporation Act was again amended on June 10, 1941, by Pub. No. 108, 77th Cong., 1st sess. Section 3 (b) of that Act adds the following to the end of section 10:

> The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with

> respect to the Reconstruction Finance Corporation but also with respect to * * * [corporations organized or created or financed and managed by the R. F. C.].

This is a clear declaration by Congress that the standard tax exemption provision was intended to include sales taxes within the general tax exemption of "the Corporation", or "every Federal land bank."

The legislative history of Pub. No. 108 explains its enactment. The House Report (H. Rpt. No. 514, 77th Cong., 1st Sess., p. 2) states:

> This section of the bill reaffirms the policy of the Congress with respect to such exemptions, making it clear (1) that the exemption extends to sales taxes, use taxes, and all other taxes except those expressly excepted under existing law, and (2) that the exemption applies to the loans and personal property of the Corporation.

The Senate Report (S. Rpt. No. 292, 77th Cong., 1st Sess., p. 2) contains practically identical language. The House members in charge of the bill stated that "This section does no more * * * than reaffirm the original intention of the Congress,"[14] and that "This is an attempt simply to state the existing situation, to clarify the present law * * *."[15] Senator Brown, in charge of

---

[14] Mr. Steagall, 87 Cong. Rec. 4616 (pamph.).

[15] Mr. Williams, 87 Cong. Rec. 4628–4629 (pamph.). See also 87 Cong. Rec. 4626, 4628 (pamph.).

the bill, stated on the floor of the Senate that the effect of the bill was that "the Reconstruction Finance Corporation and its creatures are granted the same immunity that the Government itself has. * * * I am satisfied that the pending bill does not extend the principle which has been followed in the past." [16]

Congress, of course, will not be supposed to intend a retroactive amendment of an older statute by a declaration of the legislative intention. *Haggar Co.* v. *Helvering*, 308 U. S. 389, 400. But where there is doubt as to the meaning of the statute, subsequent legislative clarification is to be given controlling weight. See *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 468–469; *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, 322; cf. *United States* v. *The Cooper Corporation*, 312 U. S. 600. Here the clarification simply reinforces the plain meaning of the original language.

This legislation is to be contrasted with Public No. 7, 77th Cong., 1st sess. approved on February

---

[16] 87 Cong. Rec. 4255–4256 (pamph.). Senator Brown's remarks in full text include the following: "I think Senators have confidence that I would not approve any bill which would extend or expand governmental tax immunity. * * * I myself am not in complete agreement with all that is provided in this section relative to tax exemption. * * * I am satisfied that the pending bill does not extend the principle which has been followed in the past." (*Id.*) The statements are harmonized on the assumption that the Senator believes that Congress should restrict the immunity which has been granted in the past.

19, 1941. Section 4 (a) of that Act provides that interest or gain on subsequently issued securities of the United States, or any agency or instrumentality thereof, shall be subject to the federal income tax.[17] This narrowing of immunity of the private persons who deal with the Government, it is to be noted, occurred in the same Congress which declared that section 10 of the Reconstruction Finance Corporation Act was intended to exempt the Corporation from sales taxes on its purchases. The difference in result underscores the difference in congressional attitude between taxes imposed upon private persons and those laid upon the Government itself.[18]

This contrast in congressional attitude is reflected, also, in the so-called Buck amendment of October 9, 1940, which authorizes state taxation of sales made on federal reservations to private persons, but excludes from this authorization sales made to or by the United States or its instrumentalities. Secs. 3 (a), 6 (b), Pub. No. 819, 76th

---

[17] The Committee reports on Public No. 7 explain the desirability of removing the exemptions of bond interest because they favor the bond purchasers with large incomes. H. Rpt. No. 20, 77th Cong., 1st Sess., p. 3; S. Rpt. No. 11, 77th Cong., 1st Sess., pp. 3-4.

[18] Compare section 63 of the Act of June 16, 1933 (48 Stat. 257, 267), providing that the exemption of the Production Credit Associations, of the Central Bank for Cooperatives, of the Production Credit Corporations, and of the Banks for Cooperatives, should be eliminated after the Government stock was retired.

Cong., 3d Sess.[19] It is quite unlikely that Congress, avowedly seeking to remove tax exemptions based on residence in a federal reservation, would have denied its consent to tax sales to federal instrumentalities if it had believed that a large group, those agencies operating under the standard tax exemption clause, were normally subject to state sales taxes.

---

[19] Sec. 3 (a) provides that the Act "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or * * * with respect to sale * * * by the United States or any instrumentality thereof * * *." Sec. 6 (b) excepts from Public No. 819 the authority to impose gasoline taxes on federal reservations which had already been granted by section 10 of the Act of June 16, 1936, 49 Stat. 1519; that section authorizes the imposition of gasoline sales taxes "when such fuels are not for the exclusive use of the United States." The committee reports make plain that the authority to tax does not extend to sales to the United States. One report of the Senate Committee states that "This bill will not permit the collection of a State sales tax with respect to purchases made by the Federal Government in the exercise of an essential governmental function * * *." S. Rpt. 1028, 76th Cong., 1st sess., pp. 1–2. Another points out that no tax may be collected from the United States or any instrumentality thereof and, *also*, that no tax may be imposed on sales *by* the United States or its instrumentality; it notes that the authority is continued to tax gasoline sold in federal areas "for private purposes." S. Rpt. No. 1625, 76th Cong., 3d sess., pp. 3–4. The House report, and the quoted letter from the Secretary of Treasury, each note that no authority is given to levy taxes which would otherwise be constitutionally forbidden. H. Rpt. No. 1267, 76th Cong., 1st sess., pp. 2–3.

5. *The Petitioner's Functions are such that Congress must have intended an Exemption.* We may concede that the construction of a doubtful tax exemption section may be influenced by the constitution and the functions of the federal agency to which it applies. By deciding whether or not tax immunity is wise the Court might hope that it had duplicated the probable legislative intention. This approach to statutory construction is hazardous in its nature; and we think it plain that there is no such doubt as to the meaning of section 26 as would permit the Court itself to make an essentially legislative decision in the effort to reach the intent of Congress. If, however, such an inquiry were made, it would serve as much to reinforce as to contradict the conclusion that Congress intended by section 26 to grant exemption to the federal land banks from all forms of taxation, except only real estate.

The organization of the federal land banks under the Federal Farm Loan Act, 39 Stat. 360, has several times been described by this Court. *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 202–207; *Federal Land Bank* v. *Gaines*, 290 U. S. 247, 251–254; *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 232–233; *Knox Loan Assn.* v. *Phillips*, 300 U. S. 194, 198–200. It is sufficient here to note that the Act set up twelve federal land banks, under the control of the Federal Farm Loan Board, to make

mortgage loans to farmers at low interest rates. Sections 3, 4, 12. The loans are made through national farm loan associations, which are local cooperative organizations of borrowers. Section 7. Each borrower subscribes to the stock of the association in the amount of 5 percent of his loan; the association subscribes to the stock of the federal land bank to the extent of 5 percent of its outstanding debt to the bank. The stock subscriptions are retired as the loans are repaid. Sections 7, 8. The federal land banks may issue farm loan bonds to an amount twenty times their capital and surplus. Sections 13, 14. The Treasury subscribed almost all of the original capital stock; this, in turn, had almost completely been retired by 1937.[29] The subsequent distressed farm conditions, however, led to heavy Government contributions to the capital and surplus of the federal land banks (see *Federal Land Bank* v. *Priddy, supra,* 232–233); on December 31, 1940, the Government owned 37.9 percent of the capital stock outstand-

[29] $8,892,130 of the original $9,000,000 capitalization of the twelve banks was Treasury subscribed; by 1931 only $204,698 of the $65,676,130 capital stock was Government owned. *Federal Land Bank* v. *Priddy, supra,* 232–233. The Government on December 31, 1932, owned 66.1 percent of the capital stock of the federal land banks; this declined to about 52 percent by 1934, stayed at that figure until 1940, and declined again to 37.9 percent by December 31, 1940. Eighth Annual Report of the Farm Credit Administration (1940), p. 173.

ing and had contributed 61.6 percent of the total capital structure.[21]

The guiding purpose of the federal land bank system is the provision of needed credit facilities, at the lowest possible interest rates, to farm borrowers. See S. Rpt. No. 144, 64th Cong., 1st Sess. (1916), pp. 7, 9, 10; sec. 12 of Federal Farm Loan Act, 39 Stat. 360; *Federal Land Bank* v. *Gaines, supra*, 250, 254. While the Court in *Smith* v. *Kansas City Title Co., supra*, chose to rely upon the depositary and bond purchasing functions of the federal land banks to sustain their constitutionality, it may no longer be doubted that their lending functions constitute "the performance of an important governmental function." *Federal Land Bank* v. *Priddy, supra*, 231. See *United States* v. *Butler*, 297 U. S. 1, 65; *Helvering* v. *Davis*, 301 U. S. 619, 640–641.

Congress intended that the costs of administration be held to the minimum. The interest rate to borrowers, under section 12 of the Federal Farm Loan Act, 39 Stat. 360, cannot exceed by more than

---

[21] The Government owned $67,402,295 of the $177,949,308 capital stock outstanding, and had contributed a balance of $145,225,633 to paid-in surplus. There was an earned surplus of $6,000,000 and undivided profits of $16,249,836. *Ibid.*, pp. 32–33, 173–177.

The Government at that time owned 71.8 percent of petitioner's $55,443,630 capital stock and had contributed a balance of $32,128,665 to its paid-in surplus. *Ibid.*, pp. 173–174.

one percent the interest rate upon the last issue of federal farm loan bonds, except with the approval of the Governor of the Farm Credit Administration, and in no event is to be more than 6 percent per annum. This is a small margin out of which to provide the costs of administration and reserves for losses on defaulted loans. The liability of the federal land banks to sales taxes upon their purchases would to some extent at least increase the costs of administration and would correspondingly contribute to the need that a higher interest rate be exacted from the borrower.

A strong argument might have been presented to Congress that the effect of state taxation was small in amount and remote in causation. However, Congress could equally have been swayed by a plea that interest rates be held to a minimum and that nothing be allowed to reduce the security of the federal farm loan system, which was based only upon the capital structure and the protection offered by the one percent margin. Congress indisputably sacrificed to the purposes of the federal land bank system a large volume of state revenues which could have been realized from taxation of federal land bank bonds, mortgages, capital, and income. It might well have felt that the operations of the federal land bank system would so expand the taxable wealth of the respective states that they could reasonably be expected to forego the revenue

to be derived from taxes imposed upon the banks themselves. In any event, we cannot believe, whatever might have been the view of enlightened economists in 1916, that Congress would have intended to permit operating expenses to be increased by sales taxes when, except for the traditional leave to tax real property, all other types of taxation were forbidden.

This conclusion is reinforced when it is considered that here, too, "this is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." *Clallam County* v. *United States*, 263 U. S. 341, 345. One ordinarily would hesitate before reading a federal tax exemption provision to exempt from state taxation an organization conducted for private profit. But, contrary to the statement of the court below (R. 36), such is not the case with the federal land banks. Over a third of its stock is owned by the United States, the remainder by its borrowers (*supra*, pp. 29–30). Of the stock owned by borrowers, almost all is owned by national farm loan associations.[24] These associations are federal instrumentalities. *Knox Loan*

[24] On December 31, 1940, the associations owned $106,960,080 of capital stock, while borrowers with direct loans (those not in a territory served by an association) owned $3,577,925 of the total capital stock of $177,940,300. Eighth Annual Report of Farm Credit Administration (1940), p. 173.

Assn. v. *Phillips*, 300 U. S. 194, 202. When dividends are declared by the federal land banks, which has not occurred since 1931,[23] they are paid to the loan association.[24] When these associations declare dividends, they go to the borrowers, who are its stockholders, and serve in effect to reduce the cost of borrowing. At no point, therefore, does the federal land bank system depart from its basic purpose to provide credit at the lowest possible rate, and to no person other than the borrower is the federal land bank stock ever a source of private profit.

6. *The administrative and judicial practice.*[25] It has been twenty-five years since section 26 of the Federal Farm Loan Act was enacted, and twenty-eight years since the standard tax exemption clause was first enacted in the Federal Reserve Act (section 7, 38 Stat. 251, 258). If there were any uniform practice with respect to the payment of sales taxes under these tax exemption clauses, it would quite evidently be a factor of considerable weight in their construction.

---

[23] Sen. Doc. No. 172, 76th Cong., 3d Sess., p. 196.

[24] The stock held by the United States, under section 5, receives no dividends.

[25] The information summarized in this section was obtained by letters addressed to the general counsel of each of the agencies listed in footnote 12, *supra*, p. 21. Their responses are summarized in Appendix B, *infra*, pp. 68–80.

Most of the federal agencies operating under the tax exemption clause (see note 12, *supra*, p. 21) have viewed this clause as exempting its purchases from any sales tax, whether imposed upon the purchaser or upon the seller. A few of the agencies have viewed the clause as exempting their purchases from taxes imposed upon the purchaser but not from those taxes which are viewed as imposed upon the seller; these are the Federal Reserve Banks, the Reconstruction Finance Corporation and, in some localities, the agencies controlled by the Farm Credit Administration and the Federal Home Loan Bank Board. The federal administrative construction, accordingly, is entirely uniform and consistent that the tax exemption clause forbids imposition of a sales tax, like that of North Dakota, which is laid upon the purchaser.

The decisions of the state courts present no such uniform picture. Federal agencies have been held exempt from sales taxes, and comparable taxes, in several states. *Federal Land Bank of Columbia* v. *State Highway Department*, 172 S. C. 174 (1933); *Craig* v. *Federal Land Bank of New Orleans*, 189 Miss. 309 (1940); *Roberts* v. *Federal Land Bank of New Orleans*, 189 Miss. 898 (1940); *Federal Reserve Bank* v. *Register of Deeds*, 288 Mich. 120 (1939); *City of Clifton* v. *State Board of Tax Appeals*, 17 Atl. (2d) 476 (N. J. S. Ct., 1941). On the other hand, a similar decision in *M. G. West*

Co. v. *Johnson*, 20 Cal. App. (2d) 95 (1937) certiorari denied, 302 U. S. 638, was qualified, if not overruled, in *Western Lithograph Co.* v. *State Board of Equalization*, 11 Cal. (2d) 156 (1938) and the decisions of the North Dakota court are to the contrary. *Federal Land Bank* v. *De Rochford*, 69 N. D. 382 (1939), and the case now at bar. So, too, is a decision of a New York trial court. *Home Owners' Loan Corporation* v. *McGoldrick* (S. Ct., June 26, 1941; 10 U. S. L. W. 2063), appeal pending.

The decisions of the state taxing authorities present an even greater contrariety of result. Five federal agencies operating under the standard tax exemption clause report a substantially complete exemption from all sales taxes and a sixth reports that it has a similar exemption from all sales taxes imposed upon the purchaser, and that it claims no greater exemption (*infra*, pp. 68–69). Three groups of agencies, those under the Federal Reserve Board, the Farm Credit Administration, and the Federal Home Loan Bank Board, operate under a decentralized administration and report widely varying results among the different states. In 16 states a substantially complete exemption from sales and gasoline taxes has, when claimed, been granted to these agencies; in 10 states there is a substantially consistent requirement that these taxes be paid; in 16 states the

rulings are inconsistent; and in 6 states, none imposing a sales tax, no exemption from the gasoline tax has been claimed (*infra*, pp. 69–79).[28]

The divergent treatment, within the same state, of different agencies and the variation in exemption of the same agency between the various states, cannot be traced to any single factor. The aggregate volume of purchases, or the amount involved in any single item, may be too small to warrant claiming an exemption. The insistence of tax collectors and of the negotiators representing the federal agency will vary from instance to instance. Those of the federal agencies which operate under a decentralized administration, such as those under the Farm Credit Administration and the Federal Home Loan Bank Board, will obtain different results in different administrative regions.

In short, the construction of the standard tax exemption clause by the federal agency is uniform in viewing their purchases as exempt from state sales taxes which are laid upon the purchaser. This uniform construction, extending over a quarter of a century, would normally be a significant

---

[28] Summarized with more particularity, these three groups of agencies report: *Sales taxes:* an exemption is allowed when claimed in 9 states, denied in 9 states, allowed or denied varying with particular agencies in 5 states, and is not claimed in 2 states. *Gasoline taxes:* an exemption is allowed in 15 states, denied in 17 states, allowed or denied varying with particular agencies in 9 states, and is not claimed in 9 states. (See *infra*, pp. 79–80).

factor in this Court's construction of section 26. But the wide variation in the construction of these clauses by the state authorities and by the state courts may weaken to some extent the force of that federal administrative construction.

II

Congress Has Power to Exempt Petitioner From State Taxes

The main ground for the decision of the Supreme Court of North Dakota was that, whatever the meaning of section 26 of the Federal Farm Loan Act, Congress was without constitutional power to exempt the lending functions of the federal land banks from state taxation (R. 24–37). The decision represents a sharp departure from the premises of *Federal Land Bank* v. *De Rochford*, 69 N. D. 382, 390–392 (1939), which viewed petitioner's claim for exemption from the gasoline tax simply as a question of congressional intent. The argument of the present opinion seems to run as follows: the lending functions of the federal land banks are not essential governmental functions (R. 29–31, 34, 35–36); they have therefore no constitutional immunity from state taxation (R. 26–27, 30–33, 35–36); and Congress is accordingly without power to provide such an immunity (R. 24–25, 27, 36–37). Both the premises and the conclusion are without support in principle and are at war with controlling decisions of this Court.

A. THE LENDING FUNCTIONS OF THE FEDERAL LAND BANKS ARE "GOVERNMENTAL"

It is unmistakably clear, both on principle and on authority, that the functions of the United States cannot be separated into "governmental" or "essential" and "proprietary" or "non-essential" activities.[1]

In some eight cases this Court has denied tax immunity to activities of states or their subdivisions wholly or in part because the activities were considered to be proprietary or not essential to the continued existence of the state government.[2] The philosophic adequacy of this doctrine, even as applied to state governments, has been questioned. See Mr. Justice Black, concurring in *Helvering* v.

---

[1] The argument is developed in some detail in the Government's brief *amicus curiae* in *Graves* v. *New York ex rel. O'Keefe*, No. 478, October Term, 1938, pp. 18–26. The decision in that and subsequent cases eliminates the need for detailed exposition here.

[2] *South Carolina* v. *United States*, 199 U. S. 437, 451–456; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172; *Ohio* v. *Helvering*, 292 U. S. 360; *Helvering* v. *Powers*, 293 U. S. 214; *Brush* v. *Commissioner*, 300 U. S. 352; *Helvering* v. *Therrell*, 303 U. S. 218; *Helvering* v. *Gerhardt*, 304 U. S. 405; *Allen* v. *Regents*, 304 U. S. 439; cf. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401. Earlier intimations of the doctrine may be found: Clifford, J., dissenting in *United States* v. *Railroad Company*, 17 Wall. 322, 333–335; *Ambrosini* v. *United States*, 187 U. S. 1, 7–8; White, J., dissenting in *Snyder* v. *Bettman*, 190 U. S. 249, 255.

Gerhardt, 304 U. S. 405, 425–427. But, certainly, there can be no basis upon which to extend the doctrine to federal activities.

The Constitution delegates to the central government certain enumerated powers. Congress can exercise no power not granted. By definition, therefore, if the federal activity is constitutional, it lies within the delegated powers. And if the Constitution delegates a given power to the federal government it cannot be said that this power is not governmental, that it is proprietary, or that it is not essential to the operations of the United States.

The realities of governmental practice confirm the result compelled by constitutional theory. It is not sufficient to dismiss as "private" the federal lending functions simply because the activity looks similar to that of a private bank or mortgage company. The purpose of the federal land bank system, for example, is not to make a profit out of farm loans. It is to offer credit to a large and needy class of borrowers. As its functions succeed, the welfare of the farmers, the credit structure of the nation, and the fiscal operations of the government are promoted. The similarity to private activities is, therefore, both superficial and irrelevant.

The practical consequences of extending to the federal government the "proprietary activity" doctrine would be alarming if not catastrophic. One supposes that the doctrine would permit

state regulatory control as well as taxation of federal activities.[3] One need only point to the national banks, the Federal Reserve Banks, the diversified operations of the institutions under the control of the Farm Credit Administration, the United States Postal Savings System, and the credit institutions under the control of the Federal Home Loan Bank Board, to indicate the startling implications of the decision below (R. 29, 31, 36) that the banking or lending activities of the United States are to be characterized as proprietary or nonessential.[4] It may be assumed, contrary to the decision below, that Congress could expressly immunize these institutions from each specific form of state control and state taxation. But it needs no elaboration to show that such a course has never been thought necessary and that the practical difficulties in the way of fore-

---

[3] The federal taxing power, although equally bulwarked by the supremacy clause, probably does not reach as far as the federal regulatory powers. See *Board of Trustees* v. *United States*, 289 U. S. 48; *United States* v. *California*, 297 U. S. 175. Probably, then, the state regulatory powers would be as extensive as their taxing powers.

[4] The brief for the United States, intervenor, in *Loomis* v. *First Federal Savings and Loan Association*, No. 277, October Term, 1938 (dismissed on motion for petitioners, *sub. nom. Martin* v. *First Federal Savings and Loan Ass'n*, 305 U. S. 666) lists and classifies (pp. 11-15) some 38 separate financial agencies of the United States, comprising about 15,000 separate corporations or organizations, with assets of about $44,000,000,000.

seeing all of the varying forms of State regulation or taxation would make the process intolerably unsatisfactory.[7]

This Court has always been careful to confine the doctrine of proprietary activities to state functions.[8] See *South Carolina* v. *United States*, 199 U. S. 437,

---

[7] The practical justification offered for application of the "proprietary" doctrine to state activities is also absent. The states have all the residuary powers of government, and there are few, if any, fields of commercial or industrial activity forbidden to them or their political subdivisions by the federal Constitution. See *Jones* v. *City of Portland*, 245 U. S. 217; *Green* v. *Frazier*, 253 U. S. 233. The exercise of the state powers in this regard, whether to a limited degree or to their fullest extent, may well be essential to the welfare of the state and its citizens. But any wide exercise of the unlimited powers of the states to displace private enterprise would raise a serious question as to federal revenue sources if immunity were to follow every state activity. See, particularly, *South Carolina* v. *United States*, 199 U. S. 437, 454; *Helvering* v. *Gerhardt*, 304 U. S. 405, 416. It is true that the scope of federal activities under the delegated powers have considerably expanded in recent years. But the comparatively greater readiness of Congress to waive immunity, which this Court has noted (*infra*, pp. 47–48), shows the threat to the revenue of the states not to be formidable.

[8] *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, is the only possible exception. From that opinion can be drawn an implication that the Court viewed the question for decision as whether the Panama Railroad was exercising governmental or proprietary functions. But the opinion is at least equally capable of a construction that the discussion related to the constitutionality of the undertaking, or was designed to bring the case within the rule of *Clallam County* v. *United States*, 263 U. S. 341, 345.

451–452; *Helvering* v. *Therrell*, 303 U. S. 218, 223. Its decisions, from the beginning of intergovernmental tax immunity litigation, have recognized and emphasized that every federal activity under the delegated powers is governmental in nature. *McCulloch* v. *Maryland*, 4 Wheat. 316, 432; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158–159. And in a recent series of notable decisions, each dealing with a corporate lending agency of the United States, the Court has categorically held that so long as the federal functions be constitutional there can be no question but that they are "governmental," not "proprietary," and "essential" rather than "non-essential." *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32; *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81, 83. The language of the Court in the *O'Keefe* case is conclusive:

> As the government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation.

The decisions of other state courts, apart from that at bar, with a single exception have held that

the lending agencies of the United States are engaged in governmental functions and are unqualified federal instrumentalities.[7]

Accordingly, so long as the lending activities of the federal land banks be constitutional, they must be viewed as essential, governmental functions equally with all other activities of the federal government. The Supreme Court of North Dakota did not challenge the lending functions of the federal land banks as unconstitutional.[8] It was, there-

---

[7] *M. G. West Co.* v. *Johnson*, 20 Cal. App. (2d) 95 (1937), certiorari denied, 302 U. S. 638; *Federal Land Bank of Columbia* v. *State Highway Department*, 172 S. C. 174 (1933); *Federal Reserve Bank* v. *Register of Deeds*, 288 Mich. 120 (1939); *Geery* v. *Minnesota Tax Commission*, 204 Minn. 107 (1938), petition for certiorari dismissed by petitioner, 307 U. S. 648, judgment vacated on authority of *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, in 204 Minn. 622 (1939); *Federal Land Bank of New Orleans* v. *Tatum*, 174 Miss. 264 (1935); *Craig* v. *Federal Land Bank of New Orleans*, 189 Miss. 309 (1940); *Roberts* v. *Federal Land Bank of New Orleans*, 189 Miss. 898 (1940); *City of Clifton* v. *State Board of Tax Appeals*, 17 Atl. (2d) 476 (N. J. S. Ct. 1941); *Federal Land Bank* v. *De Rochford*, 69 N. D. 382, 390-392 (1939).

The single exception is *Home Owners' Loan Corporation* v. *McGoldrick*, June 26, 1941, 10 U. S. L. W. 2063, (S. Ct. of N. Y., 2d Dept., Trial Term), appeal pending.

[8] The court below viewed the federal depositary and bond purchasing functions of the federal land banks as truly governmental (R. 29). But, because the decision in *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, had been placed solely upon the ground of these functions (R. 29, 35) and because of its *a priori* conviction of that lending was inherently a priv-

fore, wholly mistaken in its conclusion that petitioner's lending activities were proprietary or non-essential functions. The federal land banks are, instead, "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231.

B. CONGRESS HAS POWER TO DETERMINE THE TAX IMMUNITY OR LIABILITY OF FEDERAL INSTRUMENTALITIES

The decision of the court below (R. 24–25, 27, 36–37) that Congress has no constitutional power to prescribe tax immunity for the lending functions of federal land banks is squarely contradicted by several decisions of this Court and disregards the rudimentary principles both of constitutional theory and of tax immunity litigation.[8]

1. *This Court Has Settled the Question.* In two leading decisions this Court has sustained the power of Congress to prescribe tax immunity through the very section 26 of the Federal Farm

---

vate enterprise (R. 31, 36–37), the court below viewed the lending activities of the federal land banks as a faintly dishonest (R. 33) appendage to the governmental duties of the banks (R. 29, 33, 34). But it expressly recognized the constitutionality of these functions (R. 30–31).

[8] Our argument is presented in detail in the Government's briefs in *Graves* v. *N. Y. ex rel. O'Keefe*, No. 478, October Term, 1938, pp. 26–36, and *Pittman* v. *Home Owners' Loan Corporation*, No. 10, October Term, 1939, pp. 17–36. In view of the decision in the latter case, 308 U. S. 21, it is unnecessary again to make an elaborate argument.

Loan Act, 39 Stat. 360, here in issue, and a third has recently applied the reasoning of those cases to reach the same result under a similar statute.

In *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, the validity of section 26 was sustained so far as it exempted federal farm loan bonds from state or local taxation. The Court held that, under *McCulloch* v. *Maryland*, 4 Wheat. 316, "the power to make the securities here involved tax exempt necessarily follows" from the constitutional power of Congress to create the federal land banks (255 U. S. at 211–212).

In *Federal Land Bank* v. *Crosland*, 261 U. S. 374, the Court held invalid an Alabama tax upon the recordation of federal land bank mortgages. While it is true that the State did not challenge the validity of section 26, the opinion of the Court (261 U. S. at 377, 378, 379) leaves no doubt that it viewed its constitutionality as beyond question.

In *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, the Court held that section 4 (c) of the Home Owners' Loan Act, 48 Stat. 128, exempted the recordation of H. O. L. C. mortgages from state taxation and that the provision is constitutional. The Court said (308 U. S. at 32–33):

> Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. * * * *McCulloch* v. *Maryland*, *supra*, p. 426. * * * In this instance,

> Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. * * * Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

These decisions are conclusive of the issue here. Each, it is to be noted, contradicts the major premise of the decision below, since each sustains a congressional provision of immunity for the lending functions of a federal credit agency.

The court below ignored the *Pittman* case and distinguished the *Smith* and *Crosland* cases on the ground that the purchase of building materials was a part of "an enterprise additional to rather than incidental or related to the ostensible governmental purposes for which" the federal land banks "were created" (R. 33). But the *Smith* and *Crosland* cases, equally with that at bar, created a tax immunity for the "additional" enterprise of lending money to needy borrowers. If the opinion below be read as suggesting (see R. 33) that immunity from a sales tax is less important even to the lending functions of petitioner than is the immunity of its bonds and mortgage recordation, the short answer is that this is a question for Congress and not for the courts. Since section 26, as we have shown, exempts petitioner from every tax imposed upon it, there is no room for speculation as to whether the immunity from one tax as opposed

to another is wise or is necessary. *Pittman* v. *Home Owners' Corp.*, *supra*, 33. So long as there is a reasonable relationship betwen the legislation and the end which it is designed to promote, the courts have no power to reexamine the congressional decision that the statute is necessary and proper. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Logan* v. *United States*, 144 U. S. 263, 283; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 473–474.

2. *The Constitutional Basis.* The issue is so completely settled by the decisions of this Court that we need hardly reexamine the constitutional doctrine which gives to Congress full power to determine the tax immunity or liability of the instrumentalities which it creates. However, to err on the side of caution, the argument will briefly be sketched.

A basic postulate of a federated system such as ours is that the national government is composed of representatives of the people within each of the states, while the people outside of the state are without representation in the local legislatures. This, as Madison explained in the Federal Convention, made it necessary in Article VI to provide that the acts of Congress should be the supreme law of the land, because of "the propensity of the States to pursue their particular interests in opposition to the general interest."[10]

---

[10] *Farrand*, Records of the Federal Convention, II, 27; see also I, 164.

This Court has specifically recognized that in practice as well as in theory Congress may be expected to legislate in recognition of the states' need for tax revenues, while the converse is not necessarily true.[11] *McCulloch* v. *Maryland*, 4 Wheat. 316, 435–436; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412–413, 416–417; see *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 478.

The supremacy clause of Article VI is, in truth, the historic cornerstone of the doctrine of federal tax immunity. Even in the absence of a specific congressional declaration of immunity, it operates to forbid state taxation because the law under which the federal instrumentality operates is supreme over, and thus to be protected against, the state taxing statute. The Court in *McCulloch* v. *Maryland*, *supra*, 426, placed its decision squarely on the "great principle" that "the constitution and

---

[11] We know of no instance in which a state has ever waived the tax immunity of itself or of its agency. On the other hand the Congress has many times waived an immunity which otherwise, under existing decisions, would have attached to federal instrumentalities. Compare *Howard* v. *Gipsy Oil Co.*, 247 U. S. 503, and *Large Oil Co.* v. *Howard*, 248 U. S. 549, with *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 522–523; *Gillespie* v. *Oklahoma*, 257 U. S. 501, with *British-American Co.* v. *Board*, 299 U. S. 159, 161, 166. More specifically to indicate the frequency with which Congress waives tax immunity, there are gathered in the Government's brief in *Pittman* v. *Home Owners' Loan Corporation*, No. 10, October Term, 1939, pp. 34–35, some thirty-two Acts by which the Congress, in the course of only three Congresses (the 73d to 75th), has waived the immunity of its instrumentalities in whole or in part.

the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them." See also 4 Wheat. at 427, 433. For the succeeding half-century, the law of intergovernmental tax immunity was fashioned by this Court only in terms of federal supremacy.[12]

In *The Collector* v. *Day*, 11 Wall. 113, these cases were rearranged into a pattern which was intended to protect state activities equally with those of the National Government.[13] But even after the decision in *The Collector* v. *Day* the Court did not wholly lose sight of the traditional basis of tax immunity, or consistently ignore the specific constitutional

---

[12] *Osborn* v. *United States Bank*, 9 Wheat. 738, 868; *Weston* v. *City Council of Charleston*, 2 Pet. 449, 466–468; *Dobbins* v. *Erie County*, 16 Pet. 435, 447–450; *Bank of Commerce* v. *New York City*, 2 Black 620, 632–634; *Bank Tax Case*, 2 Wall. 200; *The Banks* v. *The Mayor*, 7 Wall. 16, 25; *Bank* v. *Supervisors*, 7 Wall. 26.

Story entertained no doubt but that Congress could tax state instrumentalities although the states could not tax federal instrumentalities. *Story*, Constitution, I, Sec. 1053.

[13] None would quarrel with the decision so far as it expresses the principle that the doctrine of tax immunity ensures "the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system" (*Helvering* v. *Powers*, 293 U. S. 214, 225). But this by no means is the equivalent of saying that a particular type of tax must necessarily and automatically be given the same treatment without consideration of whether it be imposed by the federal or by a state government. This distinction is developed in more detail in our brief (pp. 26–36) as *amicus curiae* in *Graves* v. *New York ex rel. O'Keefe*, No. 478, October Term, 1938.

basis for immunity found in Article VI in favor of a nebulous concept based only upon the implications latent in a federated system. Numerous cases have recognized that the doctrine of immunity is grounded at least in part on the supremacy clause.[14] And, in recent decisions, the Court has again explicitly recognized that one, if not the chief, basis for federal tax immunity is the supremacy clause of the Constitution. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 478.[15]

The decisions of this Court, even during the period when *The Collector* v. *Day* stood unchallenged, have indicated with a high degree of uniformity that the Court was prepared to follow the legislative decision whenever it could be ascertained. Thus, the Court has frequently recognized that

---

[14] *Missouri* v. *Gehner*, 281 U. S. 313, 321; *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 221; *Long* v. *Rockwood*, 277 U. S. 142, 147; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 613; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 117; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 521; *South Carolina* v. *United States*, 199 U. S. 437, 451–452; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41.

[15] The Court in *Graves* v. *New York ex rel. O'Keefe*, *supra*, 478–479, it is true, said "Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined." This statement seems to have been dictated more by the fact that the issue was not presented in that case than by the requirements of constitutional theory or of the decided cases.

Congress has an undoubted power to waive the immunity from state taxation which would otherwise attach to federal instrumentalities and transactions.[16] Still other cases have expressly recognized the power of Congress to create a tax immunity for persons who dealt with the Government and have held the taxpayer liable because Congress had provided no immunity.[17] Most significantly, the Court in a number of cases has extended immunity from state taxation only, or in part, because Congress has so provided.[18]

In few of these decisions recognizing that immunity from state taxation is a matter of congressional intention was the taxpayer the Govern-

---

[16] *Van Allen* v. *The Assessors*, 3 Wall. 573, 583, 585; *People* v. *Weaver*, 100 U. S. 539, 543; *Mercantile Bank* v. *New York*, 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668; *Mid-Northern Co.* v. *Montana*, 268 U. S. 45; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 525–526; *Baltimore Nat. Bank* v. *Tax Comm'n*, 297 U. S. 209; *British-American Co.* v. *Board*, 299 U. S. 159.

[17] *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23; *Trotter* v. *Tennessee*, 290 U. S. 354; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, 129; *Shaw* v. *Oil Corp'n*, 276 U. S. 575, 578–579; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323; *Goudy* v. *Meath*, 203 U. S. 146, 149–150; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 121, 125; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 589, 592.

[18] *Bank* v. *Supervisors*, 7 Wall. 26, 30–31; *Choate* v. *Trapp*, 224 U. S. 665; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 212–213; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Lawrence* v. *Shaw*, 300 U. S. 245; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32–33; see Justices Brandeis and Stone, concurring in *Miller* v. *Milwaukee*, 272 U. S. 713, 716.

ment itself. In almost every case the taxpayer was a private person who dealt with the United States, or was "a corporation having its own purposes as well as those of the United States and interested in profit on its own account" (*Clallam County* v. *United States*, 263 U. S. 341, 345). The power of Congress to create an immunity for these private taxpayers applies *a fortiori*, and in greatly intensified form, when the immunity is created for the federal land banks, which are not organized for private profit and are virtually a part of the Government itself (see *supra*, pp. 28–33).

The implication necessarily drawn from these decisions is that the tax immunity of the United States and its instrumentalities is, within broad limits, a question simply of congressional enactment. There are, it is true, constitutional limitations. But, as a matter of rudimentary constitutional theory, they leave to Congress a broad field. Only if the tax immunity has no reasonable relation to the protection of the federal function, can Congress be incompetent to provide exemption; and only if a waiver of tax immunity would in some fashion destroy the federated system, could Congress be incompetent to provide liability. Legislation of either type is so unlikely as to leave the question, in practical terms, always one of congressional intention alone.

Congress, as we have shown, has provided in section 26 that petitioner shall be exempt from

sales taxes which are imposed on it. That provision is constitutional and disposes of the issue before the Court.

CONCLUSION

The North Dakota sales tax is imposed on the buyer. Petitioner's purchases are exempt under section 26, which grants immunity from taxation to "every Federal land bank." That section is constitutional. It is respectfully submitted, therefore, that the decision of the court below should be reversed.

CHARLES FAHY,
Acting Solicitor General.
WARNER W. GARDNER,
Attorney.

MASTIN G. WHITE,
Solicitor,
ROBERT K. MCCONNAUGHEY,
Associate Solicitor,
RUSSELL D. BURCHARD,
Attorney,
Farm Credit Division,
Department of Agriculture.

SEPTEMBER, 1941.

APPENDIX A

Federal Farm Loan Act of July 17, 1916 (39 Stat. 360; 12 U. S. C. Sec. 931):

SEC. 26. That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located: but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

Nothing herein shall be construed to exempt the real property of Federal and

joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

North Dakota Laws of 1937, c. 249:[1]

§ 1. DEFINITIONS.] The following words, terms, and phrases, when used in this Act, have the meanings ascribed to them in this Section, except where the context clearly indicated a different meaning:

(a) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, the State of North Dakota and any of its sub-divisions, departments or institutions, any County, City, Village, Township, School District, Park District, Municipal Corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit, and the plural as well as the singular number.

(b) "Sale" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

(c) "Retail Sale" or "Sale at Retail" means the sale to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property and the sale of steam, gas, electricity, water, and communication service to retail consumers or users, and shall include the ordering, selecting or aiding a customer to select any goods, wares, or merchandise from any price list, or catalogue, which such customer might order, or be ordered for such customer to be shipped directly to such cus-

[1] Laws of 1939, c. 241, imposes a correlative use tax.

tomer. By the term "processing" as used in this Act is meant tangible personal property that is used in manufacturing, producing or processing and which becomes an ingredient or component part of other tangible personal property and which latter tangible personal property becomes subject to the retail sales tax. The sale of an item of tangible personal property for the purpose of incorporating it in or attaching it to other real or personal property otherwise exempt from the sales tax shall for the purposes of this Act be considered as a sale of tangible personal property for a purpose other than for processing.

(d) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

(e) "Retailer" includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or furnishing of steam, gas, electricity, water and communication service, and tickets or admissions to places of amusement and athletic events as provided in this Act, and shall include any person as herein defined who by contract or otherwise agrees to furnish for a consideration a totally or partially finished product consisting in whole or in part of tangible personal property subject to the sales tax herein provided, and all items of tangible personal property entering into the performance of such contract as a component part of the product agreed to be furnished under said contract shall be subject to the sales tax herein provided, and the sales tax thereon shall be collected by the contractor from the person for whom the contract has been performed in addition to the contract

price agreed upon, and shall be remitted to the State in the manner provided in this Act.

(f) "Gross receipts" means the total amount of the sales of retailers, valued in money, whether received in money or otherwise, provided, however, that discounts for any purposes allowed and taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. Provided, further, that on all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty (60) days from the date of sale thereof that only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed by this bill, as has actually been received in cash by the retailer during each quarterly period as defined herein

(g) "Relief agency" means the State, any County, City and County, City or District thereof, or any agency engaged in actual relief work.

(h) "Commissioner" means the Tax Commissioner of the State of North Dakota.

(i) "Local Governmental Unit" means Incorporated Cities, Towns and Villages, Counties, School Districts and Townships.

§ 2. TAX IMPOSED.] There is hereby imposed, beginning the first day of May, 1937, and ending June 30th, 1939,[2] a tax of two

[2] Laws of 1939, c. 234, Sec. 1, amends Section 2 of the 1937 Act to extend the tax through June 30, 1941, and S. B. No. 40, approved March 14, 1941, amends the section to extend the tax through June 30, 1943.

percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of steam, gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing steam, gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this Act, when sold at retail in the State of North Dakota to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this Act.

The tax herein levied shall be computed and collected as hereinafter provided.

§ 3. EXEMPTIONS.] There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

(b) The gross receipts from the sales, furnishing or service of transportation service.

(c) The gross receipts from sales of tangible personal property used for the performance of a contract on public works executed prior to May 1st, 1935.

(d) The gross receipts from sales of tickets or admissions to State, County, district, and local fairs, and the gross receipts from

educational, religious, or charitable activities, where the entire amount of such receipts is expended for educational, religious, or charitable purposes.

(e) The gross receipts from the sale by any school board of this State of books and school supplies to regularly enrolled students at cost.

§ 4. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off, for income tax purposes may be credited upon subsequent payment of the tax herein provided; provided, that if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected. The provisions of this Act shall not apply to sales of gasoline, cigarettes, snuff, insurance premiums, or any other product or article upon which the State of North Dakota now or may hereafter impose a special tax, either in the form of a license tax, stamp tax or otherwise.

§ 5. CREDIT TO RELIEF AGENCY AND LOCAL GOVERNMENTAL UNITS.]

(1) A relief agency may apply to the Commissioner for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares, or merchandise used for free distribution to the poor and needy;

* * * * *

§ 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

Agreements between competing retailers, or the adoption of appropriate rules and regulations by organizations or associations of retailers to provide uniform methods for adding such tax or the average equivalent thereof, and which do not involve price fixing agreements otherwise unlawful, and which shall first have the approval of the Commissioner, are expressly authorized and shall be held not to be in violation of any anti-trust laws of this State.

§ 7. UNLAWFUL ACTS.] It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

§ 8. RECORDS REQUIRED.] It shall be the duty of every retailer required to make a report and pay any tax under this division, to preserve such records of the gross proceeds of sales as the Commissioner may require and it shall be the duty of every retailer to preserve for a period of two years all invoices and other records of goods, wares, or merchandise purchased for resale; and all such books, invoices and other records shall be open to examination at any time by the Commissioner or any one of his duly authorized agents.

§ 9. RETURN OF GROSS RECEIPTS.]

(1) The retailer shall, on or before the 20th day of the month following the close of the first quarterly period as defined in the following Section, and on or before the 20th day of the month following each subsequent quarterly period of three months, make out

a return for the preceding quarterly period in such form and manner as may be prescribed by the Commissioner, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the Commissioner may require to enable him correctly to compute and collect the tax herein levied; provided, however, that the Commissioner may, upon request by any retailer and a proper showing of the necessity therefor, grant unto such retailer an extension of time of not to exceed thirty (30) days for making such return. If such extension is granted to any such retailer, the time in which he is required to make payment as provided for in Section Ten (10) of this Act shall be extended for the same period.

(2) The Commissioner, if he deems it necessary or advisable in order to insure the payment of the tax imposed by this Act, may require returns and payment of the tax to be made for other than quarterly periods, the provisions of Section Ten (10) or elsewhere to the contrary notwithstanding.

(3) Returns shall be signed by the retailer or his duly authorized agent, and must be verified by oath.

§ 10. PAYMENT OF TAX. BOND. CREATION OF LIEN.]

(1) The tax levied hereunder shall be due and payable in quarterly instalments on or before the 20th day of the month next succeeding each quarterly period, the first of such period being the period commencing with May 1, 1937, and ending on the 30th day of June, 1937.

(2) Every retailer, at the time of making the return required hereunder, shall compute

and pay to the Commissioner the tax due for the preceding period.

(3) The Commissioner may, when in his judgment it is necessary and advisable to do so in order to secure the collection of the tax levied under this Act, require any person subject to such tax to file with him a bond, issued by a surety company authorized to transact business in this State and approved by the Insurance Commissioner as to solvency and responsibility, in such amount as the Commissioner may fix, to secure the payment of any tax and or penalties due or which may become due from such person. In lieu of such bond, securities approved by the Commissioner, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the Commissioner and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and or penalties due. Upon any such sale, the surplus, if any above the amounts due under this division shall be returned to the person who deposited the securities.

Sub-section 4. LIEN OF TAX. COLLECTION ACTION AUTHORIZED.] Whenever any taxpayer liable to pay a tax and or penalty imposed refuses or neglects to pay the same, the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the State of North Dakota upon all property and rights to property, whether real or personal, belonging to said taxpayer.

The lien aforesaid shall attach at the time the tax becomes due and payable and shall continue until the liability for such amount is satisfied.

In order to preserve the aforesaid lien against subsequent mortgagees, purchasers or judgment creditors, for value and without notice of the lien, on any property situated in a County, the Tax Commissioner shall file with the Register of Deeds of the County in which said property is located, a notice of said lien.

* * * * *

§ 11. PERMITS; APPLICATIONS FOR.]

(1) It shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a retailer within this State shall file with the Commissioner an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the Commissioner and shall set forth the name under which the applicant transacts or intents to transact business, the location of his place or places of business, and such other information as the Commissioner may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall

be attached the written evidence of his authority.

(2) At the time of making such application, the applicant shall pay to the Commissioner a permit fee of fifty cents (50¢) for each permit, and the applicant must have a permit for each place of business.

(3) Upon the payment of the permit fee or fees herein required, the Commissioner shall grant and issue to each applicant a permit for each place of business within the State. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued.

* * * * *

§ 12. FAILURE TO FILE RETURN; INCORRECT RETURN.] If a return required by this division is not filed, or if a return when filed is incorrect or insufficient and the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the Commissioner, such Commissioner shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and or other factors. The Commissioner shall give notice of such determination to the person liable for the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days after the giving of notice of such determination, apply

to the Commissioner for a hearing or unless the Commissioner of his own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the Commissioner shall give notice of his decision to the person liable for the tax.

§ 13. APPEALS.]

(1) An appeal may be taken by the taxpayer to the District Court of the County in which he resides, or in which his principal place of business is located, within sixty days after he shall have received notice from the Commissioner of his determination as provided for in the preceding Section.

* * * * * *

§ 15. PENALTIES; OFFENSES.]

(1) Any person failing to file a return or corrected return or to pay any tax within the time required by this division, shall be subject to a penalty of five per cent (5%) of the amount of tax due, plus one per cent (1%) of such tax for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax became due; but the Commissioner, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the Commissioner and disposed of in the same manner as other receipts under this Act. Unpaid penalties may be enforced in the same manner as the tax imposed by this Act.

(2) Any person who shall sell tangible personal property, tickets or admissions to places of amusement and athletic events, or steam, gas, water, electricity and communi-

cation service at retail in this State after his license shall have been revoked, or without procuring a license within sixty (60) days after the effective date of this Act, as provided in Section 11 of this Act, or who shall violate the provisions of Section 7 of this Act, and the officers of any corporation who shall so act, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than $1,000.00 or imprisonment for not more than one year, or both such fine and imprisonment, in the discretion of the Court.

(3) Any person required to make, render, sign, or verify any return or supplementary return, who makes any false or fraudulent return with intent to defeat or evade the assessment required by law to be made, shall be guilty of a misdemeanor and shall, for each such offense, be fined not to exceed Five Hundred Dollars or be imprisoned in the County jail not exceeding one year, or be subject to both a fine and imprisonment, in the discretion of the Court.

(4) The certificate of the Commissioner to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this Act, shall be prima facie evidence thereof.

(5) Any person failing to comply with any of the provisions of this Act, or failing to remit within the time herein provided to the State the tax due on any sale or purchase of tangible personal property subject to said sales tax, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the County jail not exceed-

ing six months or by a fine not exceeding Five Hundred Dollars, or by both such fine or imprisonment at the discretion of the Court. This criminal liability shall be cumulative and in addition to the civil liability for penalties hereinbefore provided.

* * * * *

§ 21. CORRECTION OF ERRORS.] If it shall appear that, as a result of mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this Act, then such amount shall be credited against any tax due, or to become due, under this Act from the person who made the erroneous payment, or such amount shall be refunded to such person by the Commissioner.

* * * * *

§ 23. If any section, sub-section, clause, sentence, or phrase of this Act is for any reason held to be unconstitutional and invalid, such decision shall not effect the validity of the remaining portions of this Act. The Legislature hereby declares that it would have passed this Act and each section, sub-section, clause, sentence or phrase hereof, irrespective of whether any one or more of the sections, sub-sections, clauses, sentences, or phrases, be declared unconstitutional.

APPENDIX B

Administrative and Judicial Experience Under the Tax Exemption Clause

The information collected in this Appendix was gathered from correspondence with the general counsel of the respective agencies operating under a tax exemption clause (see note 12, *supra*, p. 21). The Farmers Home Corporation has had no operating functions, since the Secretary of Agriculture, for administrative reasons, has chosen under section 40 (b) of the Act (50 Stat. 522) to exercise these functions himself. The experience of the other corporations may be summarized as follows:

I

Agencies Operating Under a Substantially Uniform Exemption

A. *The Agencies*

The following agencies report that no sales taxes are imposed or paid on their purchases:

Reconstruction Finance Corporation.
Federal Deposit Insurance Corporation.
Federal Savings and Loan Insurance Corporation.
United States Housing Authority.
Federal Crop Insurance Corporation.

B. *Exceptions to Administrative Practice*

Reconstruction Finance Corporation pays sales taxes which are imposed by law on the seller rather than the purchaser. No other agency in this group makes this distinction.

Federal Deposit Insurance Corporation reports that "in a few instances to avoid delay we pay the tax as a part of the purchase price."

United States Housing Authority notes that in some instances bidders may include the sales tax in their price without the knowledge of the Authority.

Federal Crop Insurance Corporation, which purchases either through the machinery of the Department of Agriculture or on the grain exchanges, reports no exception.

Federal Savings and Loan Insurance Corporation also reports no exception.

II

AGENCIES WITH VARIABLE EXPERIENCE WITH RESPECT TO EXEMPTION

A. *The Agencies*

The following agencies report a variable experience with respect to sales taxes on their purchases.

Farm Credit Administration:
- Federal Land Banks.
- National Farm Loan Associations.
- Federal Intermediate Credit Banks.
- Central Bank for Cooperatives.
- Banks for Cooperatives.
- Production Credit Corporation.
- Production Credit Associations.
- Federal Farm Mortgage Corporation.

Federal Home Loan Bank Board:
Federal Home Loan Banks.
Home Owners' Loan Corporation.
Federal Reserve Banks.

With occasional exceptions, the Federal Reserve Banks pay an amount representing sales taxes on their purchases when the tax is considered to be a tax on the seller and have successfully resisted those taxes when it is considered to be a tax on the purchaser. The Home Owners' Loan Corporation has, in general, announced the same policy to its regional offices. A few of the district offices of the Farm Credit Administration have adopted the same criterion.

The detailed experience of these agencies with state officials cannot, however, be reconciled according as the tax is laid on the purchaser or on the seller. That experience is most readily summarized by states.[1]

B. *States Granting Exemption*

In 16 states a substantially complete tax exemption has, when claimed, been granted to these agencies:

Arkansas.—The agencies under the Farm Credit Administration report that they are exempt upon both the state sales and gasoline taxes. The Federal Reserve Bank, however, pays gasoline taxes.

Colorado.—The agencies under the Farm Credit Administration, as a result of negotiations with the state taxing authorities, have not paid the sales tax.

[1] The summary doubtless contains inaccuracies as to specific agencies in specific states. But, since the over-all picture would be no different, an arduous refinement and check was not undertaken.

However, the gasoline tax has been paid, as a matter of policy.

Florida.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled exempt from the state taxes upon gasoline.

Idaho.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax and from motor vehicle license fees; the gasoline tax, which aggregates only a small amount, has been paid pending the development of a practicable procedure to obtain refunds upon the exempt purchases.

Iowa.—The agencies under the Farm Credit Administration have been exempted, under the rulings of state officials, from the sales, the use and the gasoline tax.

Kansas.—The agencies under the Farm Credit Administration have been ruled, after negotiations, to be exempt from the sales tax; however, they pay the gasoline tax as a matter of policy. The Home Owners' Loan Corporation, and apparently the Federal Reserve Bank, have been ruled to be exempt from the sales tax.

Louisiana.—The agencies under the Farm Credit Administration have been ruled to be exempt from the state sales tax and gasoline tax, and to be exempt from the sales tax imposed by the city of New Orleans. The issue was reopened after the decision of the North Dakota court in the present *Bismarck Lumber* case, but the state authorities decided to adhere to their earlier position.

Massachusetts.—There is no sales tax. The agencies under the Farm Credit Administration do not claim an exemption from the gasoline tax, but nevertheless have been exempted on their purchases from the Standard Oil Company of New York.

The Federal Reserve Bank does not claim an exemption because the amount is too small.

New Hampshire.—There is no sales tax. The agencies under the Farm Credit Administration, as a matter of policy, do not claim exemption from the gasoline tax, but an exemption is nevertheless allowed in the case of purchases from the Standard Oil Company of New York.

North Carolina.—The agencies under the Farm Credit Administration have been ruled to be exempt from the state sales and gasoline taxes. However, under a ruling of its local counsel, the Federal Home Loan Bank pays the state sales tax. The Federal Reserve Bank has been ruled exempt from the sales tax.

Ohio.—The agencies under the Farm Credit Administration do not claim an exemption from the sales tax, but have been ruled exempt from the gasoline tax. The Home Owners' Loan Corporation, in the last of a series of rulings of the state tax commission, was held exempt from the sales tax.

South Carolina.—There is no sales tax, but the agencies under the Farm Credit Administration have been held to be exempt from the gasoline tax. They were ruled exempt from automobile license fees in *Federal Land Bank of Columbia* v. *State Highway Department*, 172 S. C. 174 (1933).

Virginia.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax.

Washington.—The agencies under the Farm Credit Administration have been ruled to be exempt from the state sales tax, gasoline tax, and automobile license fees. The Federal Reserve Bank is exempt from the sales tax.

West Virginia.—The agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax, but, since the purchases are few, they have claimed no exemption from the sales tax.

Wisconsin.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax.

C. *States Refusing Exemption*

In 10 states there is a fairly consistent requirement that sales and gasoline taxes be paid.

Alabama.—The state authorities have ruled that the agencies under the Farm Credit Administration are liable both for sales and for gasoline taxes. The rulings are recent and litigation is contemplated.

Delaware.—There is no sales tax, but the agencies under the Farm Credit Administration are required to pay the gasoline tax.

Minnesota.—There is no sales tax, but the agencies under the Farm Credit Administration are required to pay the gasoline tax. The Federal Reserve Bank pays the gasoline tax without contest because of its small amount.

Montana.—There is no sales tax, but the agencies under the Farm Credit Administration are required to pay the gasoline tax. Litigation is contemplated but is not being pressed. The Federal Reserve Bank pays the gasoline tax without contest because of its small amount.

Nebraska.—There is no sales tax, but the agencies under the Farm Credit Administration have paid the gasoline tax after unsuccessful negotiation.

Nevada.—There is no sales tax, but the agencies under the Farm Credit Administration pay the gasoline tax.

New Mexico.—The agencies under the Farm Credit Administration were exempt from the state sales tax under the earlier rulings of state authorities; these rulings were reversed early in 1941 and the agencies have since been paying the sales tax. They also pay the gasoline tax.

North Dakota.—The agencies under the Farm Credit Administration have been paying the state gasoline tax since the decision in *Federal Land Bank* v. *De Rochford*, 69 N. D. 382 (1939). The present case arises from the insistence of the state authorities that these agencies pay the sales tax.

Oregon.—There is no sales tax, but the agencies under the Farm Credit Administration pay the gasoline tax.

Wyoming.—Agencies under the Farm Credit Administration have had no experience under the sales tax, but they have paid the gasoline tax.

D. *States Where No Exemption Has Been Claimed*

In 6 states, none of which has a sales tax, the agencies under the Farm Credit Administration have paid the gasoline tax, without claiming an exemption, since they view it as an appropriate fee for the use of the state highways. These states are:

Connecticut
Maine
New Jersey
Pennsylvania
Rhode Island
Vermont

E. *States Without a Consistent Position*

In 16 states the rulings with respect to the standard tax exemption clause of federal instrumentalities are not consistent. Variations may be explained in terms of differences in the types of tax, in the failure of the agencies to claim exemption, and in the vigor with which they have prosecuted their negotiations.

Arizona.—The agencies under the Farm Credit Administration are paying sales and gasoline taxes for reasons of policy. On the other hand, the Home Owners' Loan Corporation objected successfully to payment of tax upon the sale of water.

California.—At least subsequent to the decision in *M. G. West Co.* v. *Johnson,* 20 Cal. App. (2d) 95 (1937), certiorari denied, 302 U. S. 638, the agencies under the Farm Credit Administration did not pay the state sales tax. Subsequently, after the *West* case was qualified or overruled in *Western Lithograph Co.* v. *State Board of Equalization,* 11 Cal. (2d) 156 (1938), the state officials held that these agencies were taxable. They have, as a matter of policy, not contested those rulings. These agencies also pay the gasoline tax, except that under state rulings the Production Credit Corporation and the Intermediate Credit Bank are exempt. The Home Owners' Loan Corporation successfully resisted payment of the state sales taxes. Until 1939 the Federal Home Loan Bank did not pay sales taxes; thereafter they have acquiesced in a state ruling holding them liable. The Federal Reserve Bank pays the sales tax.

467473—41——6

Georgia.—There is no sales tax, but the agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax. However, they report that they are paying this tax pending completion of negotiations and litigation as to the form of exemption certificates to be used. The Federal Reserve Bank pays gasoline taxes.

Illinois.—The agencies under the Farm Credit Administration have been ruled by the state authorities to be exempt from the gasoline tax. However, they have been ruled subject to the sales tax; since relatively few purchases are made in Illinois, this ruling has not been contested. The Home Owners' Loan Corporation was exempted from the state sales tax in 1937 but has paid sales taxes since 1939. The Federal Reserve Bank pays both the sales and gasoline tax.

Indiana.—The agencies under the Farm Credit Administration have paid sales taxes without claiming exemption, but, after negotiations with the state authorities, obtained an exemption from the gasoline tax. The Federal Reserve Bank pays the gasoline tax.

Kentucky.—The agencies under the Farm Credit Administration do not pay the automobile sales tax and, after negotiations with the state authorities, obtained an exemption from the gasoline tax. The Federal Reserve Bank, however, pays the gasoline tax.

Maryland.—There is no sales tax. The agencies under the Farm Credit Administration are exempt from the tax upon the transfer of automobiles, but the Federal Land Bank has paid this tax because in its case the exemption was conditioned upon

using a special tag. The agencies under the Farm Credit Administration pay the gasoline tax. The Federal Reserve Bank also pays the tax, stating that it does not claim the available refund because the amount is too small.

Michigan.—The agencies under the Farm Credit Administration pay the sales tax and the gasoline tax. The Home Owners' Loan Corporation, on the other hand, has been exempted from the sales tax. The Federal Reserve Bank was held exempt from a mortgage recording tax in *Federal Reserve Bank* v. *Register of Deeds,* 288 Mich. 120 (1939).

Mississippi.—The agencies under the Farm Credit Administration were first ruled exempt from the state sales tax and then ruled to be taxable by the state authorities; litigation is contemplated. These agencies were exempted from the gasoline tax by the decision in *Craig* v. *Federal Land Bank of New Orleans,* 189 Miss. 309 (1940). But, in consequence of the repeal of the exemption of the United States and its instrumentalities, the state authorities have since ruled that they are subject to the gasoline tax. The Federal Reserve Bank pays the gasoline tax. In *Roberts* v. *Federal Land Bank of New Orleans,* 189 Miss. 898 (1940), the court ruled that section 26 of the Federal Farm Loan Act exempted the Federal Land Bank from the privilege tax upon automobiles.

Missouri.—The agencies under the Farm Credit Administration and the Federal Reserve Bank have been ruled by the state authorities to be exempt from the sales tax but subject to the gasoline tax.

New York.—The agencies under the Farm Credit Administration, because they are only

slightly affected, have not claimed exemption from the New York City sales tax. They do not claim an exemption from the gasoline tax, but an exemption is nevertheless allowed in the case of purchases from the Standard Oil Company of New York. The Federal Reserve Bank has been ruled exempt from the city sales tax. Reversing an earlier ruling, the city authorities held that the Home Owners' Loan Corporation was subject to the New York City sales tax. The corporation brought suit to recover taxes paid under protest. The trial court, largely upon the authority of the present *Bismarck Lumber* case as it was decided by the Supreme Court of North Dakota, has ruled that the corporation is liable for the sales tax; the case is now pending on appeal. *Home Owners' Loan Corporation* v. *McGoldrick*, 10 U. S. L. W. 2063.

Oklahoma.—The agencies under the Farm Credit Administration, pending a ruling of the Oklahoma tax commission, are paying the sales tax; they also pay the gasoline tax. The Home Owners' Loan Corporation has successfully resisted payment of the sales tax.

South Dakota.—The agencies under the Farm Credit Administration have been held exempt from the automobile sales tax, but they pay the gasoline tax.

Tennessee.—The agencies under the Farm Credit Administration have been ruled to be exempt from the gasoline tax. The Federal Reserve Bank pays the gasoline tax.

Texas.—There is no sales tax, but the agencies under the Farm Credit Administration have been

ruled to be exempt from the gasoline tax and from the automobile license fees. The Federal Reserve Bank, however, was denied exemption from the gasoline tax.

Utah.—The agencies under the Farm Credit Administration pay both the sales and gasoline tax. The Federal Reserve Bank, however, does not pay the sales tax.

F. *Summary By States As To Agencies With Variable Experience*

1. *Sales Tax.*

Exemption when claimed is granted in 9 states: Arkansas, Colorado, Iowa, Kansas, Louisiana, North Carolina, Ohio, South Dakota, Washington.

Exemption is denied in 9 states: Alabama, Illinois, Indiana, Kentucky, Mississippi, Missouri, New Mexico, North Dakota, Tennessee.

Exemption is granted some of these agencies and denied to others in 5 states: Colorado, Michigan, New York (city sales tax), Oklahoma, Utah.

Exemption is not claimed in 2 states: Arizona, West Virginia.

2. *Gasoline Tax.*

Exemption is granted in 15 states: Florida, Idaho, Iowa, Louisiana, Massachusetts, New Hampshire, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, Washington, West Virginia, Wisconsin.

Exemption is denied in 17 states: Alabama, Delaware, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Wyoming.

Exemption is granted to some of these agencies and denied to others in 7 states: Arkansas, Colorado, Georgia, Illinois, Indiana, Kentucky, Texas.

Exemption is not claimed in 9 states: Arizona, Colorado, Connecticut, Kansas, Maine, New Jersey, Pennsylvania, Rhode Island, Vermont.

U. S. GOVERNMENT PRINTING OFFICE: 1941